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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. ~~738~~ 43

THE PEOPLE OF THE STATE OF ILLINOIS ON RELATION OF WILLIAM EDWARD WOODS,
Petitioner,

vs.

JOHN M. TUOHY, PRESIDING JUSTICE, GROVER C. NIEMEYER AND MICHAEL FEINBERG, JUSTICES, CONSTITUTING THE FIRST DIVISION OF THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT.
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Petitioner seeks to have this Court review the refusal of the Supreme Court of Illinois to entertain an original mandamus action against the Justices of the Appellate Court of Illinois to compel them to reverse their action of awarding a railroad company a new trial in an action by petitioner under the Federal Employers' Liability Act, the Boiler Inspection Act, and the Safety Appliance Act.

Under the law of Illinois the order of the Appellate Court awarding a new trial was not a final appealable order and petitioner therefore had no appeal to the Supreme Court of Illinois. In an effort to avoid a new trial and to circumvent the non-appealable character of the Appellate Court new trial order, petitioner attempted to utilize mandamus as a means of indirect appeal. The Supreme Court of Illinois denied his motion for leave to file a mandamus petition without opinion. That order is plainly sustainable on the basis of Illinois law independent of the federal questions asserted.

The present petition for certiorari is not based on the record which was before the Appellate Court on the original appeal but consists of allegations of counsel in the attempted mandamus proceeding. These allegations set up only part of the Appellate Court record and the petition contains numerous incorrect and unsupportable assertions of both fact and law. For example, it is asserted that the railroad "in effect admitted" that a car drifted because of an "inefficient handbrake" (Pet. p. 4; to the same effect, pp. 8, 12, 13, 27); that, although petitioner was awarded another trial, he has "finally and irrevocably been deprived of the benefit of the Boiler Inspection Act" (Pet. pp. 4, 20) and that the Appellate Court has "for all time" deprived him of his rights under the Safety Appliance Act (Pet. p. 13). Each and all of these we deny to be correct.

However, regardless of the merit or lack of merit, either in petitioner's factual assertions or in his contentions as to alleged errors by the Appellate Court of Illinois, this honorable Court lacks jurisdiction to review the action of the Supreme Court in denying leave to file an original mandamus action against the Justices of the Appellate Court. Under Illinois law original mandamus in the

Supreme Court cannot be used as a means of indirect appeal from a non-appealable order of the Appellate Court. Therefore, while the attempted mandamus action in the Supreme Court of Illinois presented asserted federal questions, the refusal of that Court to entertain the action is sustainable on grounds independent of a determination of the federal questions.

POINTS AND AUTHORITIES.

I.

THE ORDER OF THE SUPREME COURT OF ILLINOIS DENYING WITHOUT OPINION, PETITIONER'S MOTION FOR LEAVE TO FILE AN ORIGINAL PETITION FOR MANDAMUS AGAINST THE JUSTICES OF THE APPELLATE COURT OF ILLINOIS IS SUSTAINABLE UPON THE BASIS OF ILLINOIS LAW, INDEPENDENT OF ANY ASSERTED FEDERAL QUESTIONS, AND THIS HONORABLE COURT IS THEREFORE WITHOUT JURISDICTION TO REVIEW IT.

A.

Even When Mandamus Is a Proper Remedy Under Illinois Law the Exercise of the Supreme Court's Original Jurisdiction in Mandamus Is Discretionary With That Court

Article VI § 2, Ill. Const. 1870.

Rule 46, Supreme Court of Illinois (Ch. 110 § 254.46, Ill. Rev. Stats., 1949).

People v. *Haas*, 239 Ill. 320.

People v. *Graber*, 394 Ill. 351, 368.

People v. *Board of Education*, 197 Ill. 43.

People v. *City of Chicago*, 193 Ill. 507.

Monroe v. *Collins*, 393 Ill. 553, 557.

B.

Under Illinois Law Original Mandamus Actions In the Illinois Supreme Court Cannot Be Used to Correct Alleged Erroneous Judgments of Inferior Tribunals.

People v. *Holmes*, 312 Ill. 284.

People v. *Ehler*, 353 Ill. 595.

People v. *Donoghue*, 377 Ill. 122.

People v. *Green*, 355 Ill. 468.

People v. *Lewe*, 383 Ill. 549.
People v. *Fisher*, 372 Ill. 146.
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People v. *Graber*, 394 Ill. 362.
People v. *Graber*, 397 Ill. 518.
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C.

While the Supreme Court of Illinois Has Entertained Original Mandamus Actions to Compel Inferior Tribunals to Expunge Orders Void for Want of Jurisdiction, the Judgment of the Appellate Court, Even if Erroneous, Was Not Void for Lack of Jurisdiction.

Ch. 37 § 32, Ill. Rev. Stats., 1949.
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D.

Under Illinois Law the Illinois Supreme Court Did Not Have Jurisdiction to Review the Judgment of the Appellate Court on an Appeal From That Court Since Its Judgment Was Not Final.

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E.

Whether Original Mandamus in the Illinois Supreme Court Was an Available Remedy to Correct the Alleged Erroneous Judgment of the Appellate Court Is Solely a Question of State Law.

McClung v. *Silliman*, 6 Wheat. 598, 603.
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F.

The Refusal of the Supreme Court of Illinois to Entertain the Original Mandamus Action Rests on Adequate Non-Federal Grounds and This Honorable Court Is Therefore Without Jurisdiction to Review It.

Lynch v. *New York*, 293 U. S. 52, 54.
Allen v. *Arguimbau*, 198 U. S. 149, 154.
Cuyahoga Power Co. v. *Northern Realty Co.*, 244 U. S. 300, 304.
White v. *Ragen*, 324 U. S. 760.
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ARGUMENT.

I.

THE ORDER OF THE SUPREME COURT OF ILLINOIS DENYING, WITHOUT OPINION, PETITIONER'S MOTION FOR LEAVE TO FILE AN ORIGINAL PETITION FOR MANDAMUS AGAINST THE JUSTICES OF THE APPELLATE COURT OF ILLINOIS IS SUSTAINABLE UPON THE BASIS OF ILLINOIS LAW, INDEPENDENT OF ANY ASSERTED FEDERAL QUESTIONS, AND THIS HONORABLE COURT IS THEREFORE WITHOUT JURISDICTION TO REVIEW IT.

Petitioner's motion in the Supreme Court of Illinois for leave to file a petition for writ of mandamus against the Justices of the Appellate Court was accompanied by the proposed petition itself (R. 3-103). The proposed petition consisted of: (1) allegations of counsel setting forth selected portions of the trial record carried on appeal in the Appellate Court of Illinois in an action entitled, "*William Edward Woods, Appellee,* v. *The New York, Chicago and St. Louis Railroad Company, a corporation*"; and (2) a record of the Appellate Court proceedings including therein the opinion rendered by respondent Appellate Court judges (R. 11-15) and their order of reversal of a judgment in the original plaintiff's favor and remandment of the case to the Superior Court of Cook County, Illinois, for a new trial (R. 26).

The opinion shows that the petitioner as the original plaintiff had recovered a judgment for $40,000 against The New York, Chicago and St. Louis Railroad Company in the Superior Court of Cook County on a jury verdict in an action brought under the Federal Employers' Liability Act (45 U. S. C. §§ 51-59), Federal Safety Appliance Act (45 U. S. C. § 11) and the Federal Boiler Inspection

Act (45 U. S. C. § 23). On appeal the railroad assigned a number of errors, the principal contentions being that the Trial Court "erred in giving instructions permitting recovery under the Safety Appliance and Boiler Inspection Acts because there is no evidence of a violation of either, and, that the damages awarded are excessive'" (R. 12). Respondents, as Justices of the Appellate Court, found it necessary to pass only on the first mentioned contention. They concluded that there was no evidence tending to prove a violation of the two safety acts mentioned; that the Trial Court accordingly erred in giving instructions permitting recovery under them; that under these acts contributory negligence cannot be asserted either as a defense or in mitigation of damages, but that it must be considered in reduction of damages under the Federal Employers' Liability Act; that "the damages awarded [$40,000] are large and it may be that the jury, relying on the instructions relating to the Safety Appliance and Boiler Inspection Acts, failed to consider the question of contributory negligence in making the award" (R. 14).

The opinion of respondents as Justices of the Appellate Court of Illinois reflects respondents' interpretation of the law applicable to the record that was before it, and we submit that it is eminently correct. But it would serve no useful purpose to write a brief justifying that opinion or undertaking to answer counsel's intemperate criticism of it (Pet. p. 28) since the judgment of new trial pursuant thereto is not reviewable by this Court in the manner attempted. The action of the Supreme Court of Illinois in denying petitioner's motion for leave to file a mandamus petition against respondents and thus by indirection secure a review of respondents' interlocutory order on a partial and incomplete record is sustainable on the basis of well settled Illinois law.

A.

Even When Mandamus Is a Proper Remedy Under Illinois Law the Exercise of the Supreme Court's Original Jurisdiction in Mandamus Is Discretionary With That Court.

The original mandamus jurisdiction of the Supreme Court of Illinois is derived from Article VI § 2 of the Illinois Constitution of 1870, which provides:

> "The Supreme Court shall consist of seven judges, and shall have original jurisdiction in cases relating to the revenue, *in mandamus* and *habeas corpus* and appellate jurisdiction in all other cases."

The institution of original mandamus proceedings in the Supreme Court is regulated by Rule 46 of that Court which provides:

> "Mandamus proceedings in the Supreme Court shall be instituted by filing a motion, supported by suggestions for leave to file a petition seeking a writ of mandamus. Such motion shall be heard *ex parte*, and if it be allowed, summons shall issue, returnable within such time as the Court shall direct in the order permitting the filing of the petition." (Ill. Rev. Stats., 1949, ch. 110 § 254.46.) See, also, *People* v. *Haas*, 239 Ill. 320.

Even where mandamus is an available remedy it is firmly settled in Illinois that the exercise by the Supreme Court of its original jurisdiction in mandamus is discretionary. *People* v. *Graber*, 394 Ill. 362, 368. That Court has held that the constitutional provision above quoted only requires the Court to take original jurisdiction in such matters as pertain to the public interest, either on behalf of the State or some officer of the State, or in such cases of emergency as the Court, exercising a sound legal discretion deems proper to entertain; that it will not grant leave to file a petition where the matter is of local interest only. *People*

v. *Board of Education,* 197 Ill. 43; *People* v. *City of Chicago,* 193 Ill. 507. In *Monroe* v. *Collins,* 393 Ill. 553, 557, the Court expounded at some length on some of the factors which induce it to deny leave to file an original action in mandamus, but refused "to specify all the grounds on which a leave to file may be denied." (p. 557.)

B.

Under Illinois Law Original Mandamus Actions In the Illinois Supreme Court Cannot Be Used to Correct Alleged Erroneous Judgments of Inferior Tribunals.

In the instant case the Court gave no reasons for denying leave to file the petition. But whatever the reason or reasons that induced the Court to deny leave, its refusal is sustainable on the basis of Illinois law, independent of any asserted federal questions. The procedure attempted by petitioner to secure an indirect review of the Appellate Court's interlocutory judgment is not permissible under Illinois law.

It has been held repeatedly that mandamus cannot be used to control judicial discretion or to review the action of a tribunal in any matter involving the examination of evidence and the decision of questions of law and fact; *People* v. *Holmes,* 312 Ill. 284; that it does not lie to direct or modify the exercise of judicial discretion by a Court. *People* v. *Ehler,* 353 Ill. 595; *People* v. *Donoghue,* 377 Ill. 122; that, where a Court has jurisdiction of the proceedings and of the parties, its judgment is not void, and whether it was right or wrong cannot be inquired into by mandamus. *People* v. *Green,* 355 Ill. 468; *People* v. *Lewe,* 383 Ill. 549; *People* v. *Fisher,* 372 Ill. 146; *People* v. *Cook,* 311 Ill. 429. As said by that Court in *People* v. *Shurtleff,* 353 Ill. 248, 259:

"It is not the office of the writ of mandamus to re-

> view the orders, judgments or decrees of courts for error in their rendition or to correct, direct or control the action of a judge in any manner which he had jurisdiction to decide."

As part of the record in this Court petitioner has included his Illinois Supreme Court brief in support of the petition for leave to file a mandamus action (R. 51-92). It appears therefrom that his first proposition was:

> "This [Illinois Supreme] Court has power to order the judgment of the Appellate Court expunged and the judgment of the Superior Court of Cook County affirmed by writ of mandamus."

In support of that contention a number of decisions were cited, but examination of them reveals that they were all cases where the Illinois Supreme Court entertained an original petition for mandamus to compel a judge of an inferior court to expunge an order which was void for want of jurisdiction to enter it. (*People* v. *Graber,* 394 Ill. 362; *People* v. *Graber,* 397 Ill. 518; *People* v. *Keeney,* 399 Ill. 611.)

The legal conclusion in the petition in the Illinois Supreme Court that the judgment of the Appellate Court was "void" (R. 28) and the same assertion made in the brief is so utterly frivolous as to raise doubts as to whether it was made in good faith.

C.

While the Supreme Court of Illinois Has Entertained Original Mandamus Actions to Compel Inferior Tribunals to Expunge Orders Void for Want of Jurisdiction, the Judgment of the Appellate Court, Even if Erroneous, Was Not Void for Lack of Jurisdiction.

That the original appeal was properly taken from the Superior Court of Cook County to the Appellate Court and that that Court properly had jurisdiction of the case is

not contested. Indeed, no contention was made in the motion to the Illinois Supreme Court that the appeal was not properly taken to the Appellate Court; the assertion was that the judgment of the Appellate Court was so erroneous as to be "void" (Ill. Sup. Ct. br., pp. 9-11).

However, it is settled law in Illinois that "jurisdiction of the subject matter is authority to hear and decide a cause and does not depend on the correctness of the decision entered." *People* v. *Leavens,* 288 Ill. 447, 448; *People* v. *Hill,* 344 Ill. 246. As said by the Court in *O'Brien* v. *People,* 216 Ill. 354, 364; and *Baker* v. *Brown,* 372 Ill. 336: "Jurisdiction does not depend upon the rightfulness of the decision. It is not lost because of an erroneous decision, however erroneous that decision may be." Or, as put in *Murch* v. *Epley,* 385 Ill. 138, 145, "jurisdiction to hear and decide a cause necessarily includes the right to render an erroneous decision." The fact that the Appellate Court actually had jurisdiction is recognized by the prayer of the petition which was that respondents should be commanded to affirm the judgment of the Superior Court (R. 30).

D.

Under Illinois Law the Illinois Supreme Court Did Not Have Jurisdiction to Review the Judgment of the Appellate Court on an Appeal From That Court Since Its Judgment Was Not Final.

The Supreme Court of Illinois did not have jurisdiction to review the judgment of the Appellate Court on a direct appeal since the Appellate Court judgment was not final. Under the law of Illinois a review of the judgments, orders and decrees of the Appellate Court by the Supreme Court can only be had where any such judgment, order or decree of the Appellate Court is a final order. (Ch. 110, § 199 (2)(b), Ill. Rev. Stats., 1949); *Dowdall* v. *Hutchens,*

347 Ill. 326, 327; *Cowen* v. *Harding Hotel Co.*, 396 Ill. 477, 479. Judgments, orders and decrees of the Appellate Court are final only when they are such as to put an end to the litigation by determining the rights of the parties therein. *Fanning* v. *Rogerson*, 142 Ill. 478; *Morris* v. *Beatty*, 390 Ill. 568, 574; *Cowen* v. *Harding Hotel Co.*, 396 Ill. 477, 479. In other words, the judgment, order or decree must finally dispose of the merits of the case in such manner that no further proceedings can be had in the lower court except to carry into effect the mandate of the Appellate Court. *People* v. *Board of Education*, 275 Ill. 195, 196. Accordingly, it has been held in numerous cases that a judgment of the Appellate Court reversing the judgment of the Trial Court, and remanding the cause for such other and further proceedings as to law and justice shall appertain, is not a final judgment from which an appeal will lie to the Supreme Court. *Buck* v. *County of Hamilton*, 99 Ill. 507; *Knapp, Stout & Co.* v. *Ross*, 181 Ill. 392, 395; *Wolkau* v. *Wolkau*, 280 Ill. 298, 299; *Streeter* v. *Humrichhouse*, 357 Ill. 234, 238; *People* v. *Board of Education*, 275 Ill. 195, 196. Similarly, a judgment of the Appellate Court reversing and remanding a cause for a new trial is not appealable from the Appellate Court to the Supreme Court. *Riley* v. *Lamson*, 253 Ill. 258; *Corcoran* v. *City of Chicago*, 373 Ill. 567, 569.

It is obvious that if the Supreme Court of Illinois should permit original mandamus actions to be instituted in that Court against the Justices of the various Appellate Courts to compel them to expunge alleged erroneous interlocutory and non-appealable orders, it would be flooded with such petitions and the statutory limitation that its power of review be exercised only as to final orders would be evaded. The mere fact that the judgment rendered by the Appellate Court was in a case in which petitioner asserted fed-

eral rights could not serve to enlarge the jurisdiction of the Illinois Supreme Court. And that Court is the final arbiter of the extent of its jurisdiction and the availability of original mandamus as a remedy.

E.

Whether Original Mandamus in the Illinois Supreme Court Was an Available Remedy to Correct the Alleged Erroneous Judgment of the Appellate Court Is Solely a Question of State Law.

It follows from what has been said above that the order of the Supreme Court of Illinois is sustainable on purely State grounds. This Court said in *John* v. *Paullin,* 231 U. S. 583, 585:

> "Without any doubt it rests with each State to prescribe the jurisdiction of its Appellate Courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local and general law."

F.

The Refusal of the Supreme Court of Illinois to Entertain the Original Mandamus Action Rests on Adequate Non-Federal Grounds and This Honorable Court Is Therefore Without Jurisdiction to Review It.

The present petition for certiorari does not call for any extended review of the authorities holding that a petitioner must show that a decision of a State Court could not have been made without deciding a federal question. This Court has held that where the Supreme Court of Illinois has refused, without opinion, to entertain an original action

(*habeas corpus*) and this Court was unable to say that the refusal did not rest on an adequate non-federal ground, the writ of certiorari must be denied. *White* v. *Ragen*, 324 U. S. 760. In the case at bar Supreme Court has refused, without opinion, to entertain an original *mandamus* action and numerous and adequate non-federal grounds for such refusal exist. *White* v. *Ragen*, of course, merely follows the general rule of *Lynch* v. *New York*, 293 U. S. 52, 54. In that case this Court said (p. 54):

> "It is essential to the jurisdiction of this Court in reviewing a decision of a Court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest Court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. * * * Where the judgment of a state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction. * * *"

In *Allen* v. *Arguimbau*, 198 U. S. 149, 154, cited in the foregoing case, this Court said:

> "The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad, but if the judgment rested on two grounds, one involving a federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction."

In *Cuyahoga Power Co.* v. *Northern Realty Co.*, 244 U. S. 300, 304, also cited in the *Lynch* case, this Court said:

> "* * * the case presents the single question of

> what principle is to be applied where from an absence of an opinion expressed by the Court below it is impossible to say whether its judgment was rested upon State questions adequate to sustain it independent of the federal questions or upon such federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in *Allen* v. *Arguimbau,* 198 U. S. 149, 154-155 * * *."

And in *Woods* v. *Nierstheimer,* 328 U. S. 211, this Court held it was without power to review a judgment of an Illinois *nisi Prius* court denying a petition for *habeas corpus* where the denial of the petition could have rested, and probably did rest, on the grounds that *habeas corpus* was not a proper remedy in the case under Illinois law.

Petitioner's Authorities Distinguished.

Petitioner has cited the following cases as sustaining the jurisdiction of this Court: *Brown* v. *Western Railway of Alabama,* 338 U. S. 294; *Urie* v. *Thompson,* 337 U. S. 163; *United States Alkali Export Association* v. *United States,* 325 U. S. 196; *House* v. *Mayo,* 324 U. S. 42; *Ex Parte Republic of Peru,* 318 U. S. 578 (Pet. p. 7). None of the cases has the remotest relevancy.

The *Urie* and *Brown* cases are cases where this Court reviewed on certiorari *final* judgments of State Courts in denying recovery under the Boiler Inspection Act in one case (*Urie*) and the Federal Employers' Liability Act in the other (*Brown*). Neither case presented the question as to whether the judgment of the State Court was sustainable on an independent State ground.

The other three cases cited concern this Court's power to issue various writs to lower Federal Courts under for-

mer Section 262 (now Title 28 § 1651) of the Judicial Code and have nothing to do with Courts outside the federal system.

Because the order of the Supreme Court of Illinois is sustainable on adequate and independent non-federal grounds, the petition for certiorari should be dismissed.

Respectfully submitted,

HAROLD A. SMITH,
GEORGE B. CHRISTENSEN,
EDWARD J. WENDROW,
Counsel for John M. Tuohy, Grover C. Niemeyer and Michael Feinberg, Justices of the First Division of the Appellate Court of Illinois for the First District.

May 3, 1950.